Supreme Court of the United States.

OCTOBER TERM, 1971.

No. 71-

I. CHARLES BAKER,
Petitioner,
v.
THOMAS S. EISENSTADT,
SHERIFF OF SUFFOLK COUNTY,
Respondent.

CONDITIONAL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

I. Charles Baker conditionally petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on February 23, 1972. Should this Court refuse certiorari in No. 71-1526, it is respectfully requested that this conditional petition for a writ of certiorari also be denied.

Opinions Below.

The opinion of the Court of Appeals is reported at 456 F. 2d 382 (App. D, pp. 44-65).[1] The opinion of the District

[1] Appendix references are to the appendices in No. 71-1526.

Court (App. C, pp. 37-43) is not yet reported. The first opinion of the Supreme Judicial Court of Massachusetts on respondent's claim of immunity (App. A, pp. 12-18) is reported at 1971 Massachusetts Advance Sheets 1689. The second opinion of the Supreme Judicial Court concerning respondent's sentencing (App. B, pp. 19-36) is reported at 1971 Massachusetts Advance Sheets 1817.

Jurisdiction.

The judgment of the Court of Appeals (App. E, p. 66) was entered on February 23, 1972. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Questions Presented.

1. Where a witness erroneously, but in good faith, asserts the privilege against self-incrimination in open court, is that court required to notify the witness what type of contempt (civil or criminal) proceedings will be initiated if the refusal persists?

2. Can a good faith but erroneous assertion of the privilege against self-incrimination in open court be summarily punished?

Constitutional Provisions Involved.

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> "... nor shall any State deprive any person of life, liberty, or property, without due process of law ...."

The Sixth Amendment to the Constitution of the United

States provides, in pertinent part:

> "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence."

Statement.

Baker, the petitioner, was called to testify during the course of proceedings held before five justices of the Massachusetts Supreme Judicial Court with respect to allegations of misconduct on the part of two Massachusetts Superior Court judges. He claimed that if he were required to testify, he might incriminate himself, and "that insofar as he is able and permitted, he will plead the 4th and 5th Amendment in answer to various questions." (Tr. 726.)[2]

In response to Baker's claim, the Commonwealth stipulated that he could be afforded a broad grant of immunity from prosecution with respect to the matters to be inquired into. The stipulation was twice amended at the urging of the Supreme Judicial Court (App. B, p. 35), and the Court filed an opinion with respect to Baker's assertion of his Fifth Amendment rights (App. A). In that opinion, the Court found that Baker was fully protected by the Commonwealth's stipulation (*Id.* at 14).

Baker was then recalled to the stand (Tr. 1225) on the ninth day of the hearing, November 29, 1971. Forty-six separate questions were put to him (Tr. 1226-1261), and to each question his response was:

> "Relying on the Fourth and Fifth Amendments to the Constitution of the United States, I respectfully decline to answer." (Tr. 1226 et seq.)

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[2] Transcript references are to the transcript before the Supreme Judicial Court. A copy of that transcript was included in the return to the petition for habeas corpus.

The court adjudged petitioner to be in contempt for each refusal to answer a question put to him by the court's special counsel and counsel for the two Superior Court judges, and the adjudications took place immediately upon Baker's refusal to testify.

After each refusal to answer, Chief Justice Tauro of the Supreme Judicial Court ordered the witness to answer; petitioner again asserted the privilege, whereupon the Chief Justice "adjudged" the witness "to be in contempt of court." (Tr. 1227.) The sentence was reserved and the next question was ordered put to the witness (Tr. 1226-1262). The court did not indicate whether the adjudication was for civil or criminal contempt; in fact, the court categorically refused to inform petitioner of the nature of the contempt (Tr. 1468-1474). However, 15 days after the imposition of the sentences the court categorized the offenses as criminal (App. B, p. 22).

In the interval between the findings of contempt and sentencing, a jury trial and an evidentiary hearing were requested by petitioner. These were denied (App. B. p. 21; Tr. 898, 1225-1226).

Reasons for Granting the Writ.

Petitioner submits that should this Court grant certiorari in No. 71-1526, other compelling issues presented in the matter of *Baker* v. *Eisenstadt*, 456 F. 2d 382 (App. D, pp. 44-65) should also be reviewed.

The rights of notice and to a hearing on the charges are the most fundamental rights in Anglo-American jurisprudence. These rights are as applicable to criminal contempt as to any other crimes. As this Court has held in *Bloom* v. *Illinois*, 391 U.S. 194 (1968) "[c]riminal contempt is a crime in the ordinary sense . . . [and] convictions for criminal contempt are indistinguishable from ordinary

criminal convictions . . . ." (*Id.* at 201.) Given that criminal contempt is "indistinguishable" from other crimes, it follows that the rights to which defendants in other criminal cases are entitled apply also to defendants in criminal contempt cases. Indeed, the federal courts have held that "[t]he respondent is entitled to due notice of the nature of the proceeding against him—whether of civil or criminal contempt." *Parker* v. *United States,* 153 F. 2d 66, 70 (1st Cir., 1946), citing *In Re Guzzardi,* 74 F. 2d 671 (2d Cir., 1935); *McCann* v. *New York Stock Exchange,* 80 F. 2d 211, 214 (2d Cir., 1935); *Federal Trade Commission* v. *A. McClean & Son,* 94 F. 2d 802 (7th Cir. 1938). Petitioner here was denied this notice. Moreover, petitioner here was denied other rights guaranteed him by the due process clause of the Fourteenth Amendment. As this Court held as long ago as 1911 in *Gompers* v. *Bucks Stove & Range Co.* 221 U.S. 418 (1911), "it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself." (*Id.* at 144.) Petitioner was denied all of these rights; yet, it is clear that in all criminal proceedings, state or federal, adult or juvenile, "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In Re Winship,* 397 U.S. 358, 364 (1970). Since "[c]riminal contempt is a crime in the ordinary sense . . . [and] convictions for criminal contempt are indistinguishable from ordinary criminal convictions," *Bloom* v. *Illinois,* 391 U.S. 194, 201 (1968), it logically follows that these rights are applicable to defendants in criminal contempt proceedings before state courts.

To be sure, petitioner was fully aware that the Court might attempt to coerce the desired testimony through contempt proceedings. But this awareness falls far short of the

requisite notice in a constitutional sense. The Supreme Judicial Court failed and refused to inform petitioner whether the contempt was civil or criminal. This is not a case analogous to *United States* v. *United Mine Workers of America,* 330 U.S. 258 (1947), where the Supreme Court upheld convictions for criminal contempts, notwithstanding the absence of the words "criminal contempt" in the petition for contempt, because there was no "substantial prejudice" to the defendants especially since "they enjoyed during the trial itself all the enhanced protections accorded defendants in criminal proceedings." (*Id.* at 298.)

The value of notice and a hearing are real. If petitioner had been made aware of the nature of the contempt and the lack of opportunity to purge he might well not have risked testing the validity of the claim of the privilege through appellate processes, but rather have opted to testify. This balancing process, *i.e.,* taking a chance on vindication in the appellate process versus testifying, is in essence the same process utilized in plea bargaining most recently sanctioned by this Court. *Santobello* v. *N.Y.* 404 U.S. 257 (1971). However, an intelligent decision cannot be reached unless one knows what he is charged with and what the possible penalties are.

Increasingly, the courts have curtailed summary punishment. In *Bloom* v. *Illinois,* 391 U.S. 194, 207 (1968) the Court observed:

> "This course of events demonstrates the unwisdom of vesting the judiciary with completely untrammeled power to punish contempt, and makes clear the need for effective safeguards against that power's abuse. Prosecutions for contempt play a significant role in the proper functioning of our judicial system; but despite the important values which the contempt power protects, courts and legislatures have gradually eroded the power of judges to try contempts of their own authority.

> In modern times, procedures in criminal contempt cases have come to mirror those used in ordinary criminal cases."

The ostensible justification for the summary contempts here is that the judges of the Supreme Judicial Court witnessed the alleged contempt in open court (App. B, p. 25). Such a position is erroneous, ignoring the historic limitations upon the power of summary contempt, *supra,* and decisions directly on point. The cornerstone of the exercise of summary punishment is *the absolute necessity for its use:*

> "Punishment without issue or trial was so contrary to the usual and ordinarily indispensable hearing before judgment, constituting due process, that the assumption that the court saw everything that went on in open court was required to justify the exception; *but the need for immediate penal vindication of the dignity of the court created it.*" *Cooke* v. *United States,* 267 U.S. 517, 536 (1925). (Emphasis supplied.)

Within this framework, the courts have held that summary punishment may not be imposed on a recalcitrant witness. *Ex Parte Hudgings,* 249 U.S. 378 (1919); *In the Matter of Michael,* 326 U.S. 224 (1945); *Harris* v. *United States,* 382 U.S. 162 (1965); *Carlson* v. *United States,* 209 F. 2d 209 (C.A. 1, 1954); *United States* v. *Pace,* 371 F. 2d 810 (C.A. 2, 1967).

In *Harris* v. *United States,* 382 U.S. 162 (1965), it was held improper to sentence a grand jury witness under Rule 42(a) of the Federal Rules of Criminal Procedure for refusing to testify.

The Second Circuit has extended the *Harris* holding to a recalcitrant witness who refused to testify in open court. *United States* v. *Pace,* 371 F. 2d 810 (1967). The opinion below, however, declined to follow *Pace* (App. D, pp. 51-53).

Conclusion.

It is respectfully submitted that the constitutional limitations with regard to notice and hearing in contempt cases are especially ill defined. There is a conflict between the First and Second Circuits with regard to a court's power to impose summary punishment for a refusal to answer in open court. These issues should be finally resolved, not only to do away with inconsistent decisions, but to provide future guidance to the courts.

For these reasons, it is respectfully requested that in the event the Court should grant the petition for writ of certiorari in No. 71-1526, this petition should also be granted.

Respectfully submitted,

MONROE L. INKER,
KEVIN M. KEATING,
CHARLOTTE ANNE PERRETTA,
CRANE, INKER & OTERI,
20 Ashburton Place,
Boston, Massachusetts 02108,
Attorney for Petitioner.

71-1679

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. ~~71-1625~~

I. CHARLES BAKER,
PETITIONER,

v.

THOMAS S. EISENSTADT, Sheriff of Suffolk County,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM IN OPPOSITION

ROBERT H. QUINN,
Attorney General
WALTER H. MAYO III,
Assistant Attorney General
373 State House
Boston, Mass. 02133
Attorneys for Respondent

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1629

I. CHARLES BAKER,
PETITIONER,

v.

THOMAS S. EISENSTADT, Sheriff of Suffolk County,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM IN OPPOSITION

The judgment of the court of appeals was entered on February 23, 1972. By order of Mr. Justice Brennan, an extension of time to file a petition was granted to and in-

cluding June 22, 1972. The petition was not docketed until June 23, 1972. The petition for a writ of certiorari is therefore out of time, and certiorari should be denied.

Respectfully submitted,

ROBERT H. QUINN,
Attorney General
WALTER H. MAYO III,
Assistant Attorney General
373 State House
Boston, Massachusetts 02133
Attorneys for Respondent

July 1972.